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No. 04-698

Supreme Court U.S.
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In The

Supreme Court of the United States

BRIAN SCHAFFER, a minor by his parents and next friends, JOCELYN AND MARTIN SCHAFFER, *et al.*,

Petitioners,

v.

JERRY WEAST, Superintendent of Montgomery County Public Schools, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The Fourth Circuit Court Of Appeals

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

Nothing in the respondents' brief in opposition calls into question the need for this Court to review and reverse the decision below. Indeed, the more respondents' brief is studied, the more apparent it becomes that the petition should be granted. Additionally, a new decision by the Fourth Circuit, handed down after the petition was filed, affirms the sweeping rule adopted below, underscores the importance of the burden of proof and confirms the need to grant certiorari.

1. Respondents concede that "[t]he IDEA is silent as to which party bears the burden of proof in an administrative hearing brought under the IDEA." Br. in Opp. at 8.

2. Respondents fail to address – and, thus, implicitly acknowledge – key points that make this petition a worthy candidate for certiorari. For example:

(a) Respondents do not deny that the lower courts are deeply divided on which party bears the burden of proof, with six circuits adopting the rule favored by the petitioners and four favoring the contrary rule adopted by the decision below. *See* Pet. at 17.

(b) Respondents do not deny that the issue is an important one. While petitioners view the matter as one implicating civil rights, Pet. at 21, respondents insist that it be made a matter of States' rights instead. Br. in Opp. at 15. The fact that the parties view the same subject so differently is not, however, a reason to deny certiorari. *See infra* at 3.

(c) Respondents do not dispute the fact that this petition presents an ideal vehicle for resolving the issue. As the petitioners previously noted, (i) the split is mature,

(ii) the case is not cluttered by collateral issues, and (iii) the decision below – with its majority opinion and dissent by Judge Luttig – neatly frames the issue for resolution by this Court. See Pet. at 29. None of these points are challenged by the brief in opposition.

3. Respondents seek to highlight various factual findings made by the administrative law judge ("ALJ"); however, the question presented to this Court is strictly a legal one unaffected by such evidentiary matters. Moreover, after twice reviewing the evidence in detail, the ALJ twice concluded that resolution of the case depends on which side bears the burden of proof. App. 144 (first hearing); App. 70, 105, 109 (second hearing).[1] Indeed,

[1] Consistent with the pivotal role played by the burden of proof, the findings respondents cite are largely drawn from the ALJ's *initial* opinion, when the burden of proof was on the parents. Many of the key initial findings were not repeated in the ALJ's second decision, when the burden of proof was placed on the school district.

Other assertions by respondents are simply misleading. While not relevant to the outcome of this petition, they constitute an unfair attempt to cast the parents in an unfavorable light and thus warrant a brief response. For example:

- Respondents correctly note that the parents did not visit the program offered by the school district at Hoover Middle School. Br. in Opp. at 2. Yet, they neglect to mention that Brian's mother did visit the supposedly more favorable program offered by the school district at Frost Middle School. App. 89, 134-35. Since Mrs. Schaffer found the program at Frost to be inadequate, there was no need to visit Hoover.
- Similarly, respondents correctly note that the parents paid a $750 fee to the McLean School in March of 1998, before the disputed IEP was developed. Br. in Opp. at 1-2. Yet, they fail to mention that this fee did not commit the parents to send Brian there or to pay the year's tuition. The purpose was simply to "reserve a place" for Brian at that school, App. 82, thereby preserving their options.

respondents candidly acknowledge the critical role played by the burden of proof, conceding that the ALJ reversed his initial decision and ruled for the parents "[b]ased solely on the reallocation of the burden of proof ordered by the district court." Br. in Opp. at 6. This concession demonstrates both the importance of the burden and the appropriateness of this case as a vehicle for deciding where it should be placed.

4. Unable to challenge the appropriateness of certiorari, respondents retreat into a misplaced argument on the merits of the decision below. Mechanically restating the position of the Fourth Circuit, respondents contend that "there is no reason to depart from the general rule that a party initiating a proceeding should bear the burden of proof." Br. in Opp. at 15. Yet, as Judge Luttig explained in his dissent, the reasons to depart from such a rule are compelling. *See* App. 16. Nowhere do respondents mention – much less refute – Judge Luttig's analysis. Even more important at the petition stage is the fact that the split decision in the panel illustrates the deep division among the circuits. Certiorari should be granted so that the error may be corrected – wherever it lies – and a uniform national rule established.

5. Respondents also argue that no uniform rule is needed and that the States should be allowed to allocate the burden of proof however they wish. Br. in Opp. at 15. This argument is also misplaced.

(a) Respondents' position contrasts sharply with the position taken by the thirteen States that have made known their views on this petition. *See* Brief of the Commonwealth of Virginia and Twelve Other States as Amici Curiae in Support of the Petitioners. Drawn from all parts of the Union, these States are emphatic in their view that

"there must be a single national rule" on which party bears the burden of proof in an IDEA administrative hearing. *Id.* at 1.

(b) Respondents note that four States plus the District of Columbia have adopted regulations allocating the burden of proof in IDEA cases. Br. in Opp. at 18-20. Yet, they point to no statute or regulation where their *own* State – Maryland – has attempted to allocate the burden. Even if States were vested with discretion on this issue, there would still be a need for a federal rule assigning the burden of proof in cases, such as the one at bar, where that discretion has not been exercised.

(c) Where a State has adopted a regulation placing the burden of proof on the school district, it may be best viewed as a concession by the State as to what is required by federal law. Alternatively, it may be viewed as an attempt by the State to support parents whether or not federal law requires it. In neither event does such state action suggest that States are free to impose the burden on parents instead. To the extent that any State may now be doing so, it is yet another reason for this Court to grant certiorari and review the issue.

(d) The decision by the Fourth Circuit was based on its interpretation of *federal* law, not state law. The same is true of the decisions by the district court and the ALJ. The same is true of the decisions by the other circuits that have allocated the burden of proof in IDEA cases. While the circuits are divided in how they allocate the burden, none have suggested that it is a matter of state discretion. If there were any merit in respondents' claim that state law should govern, the fact that such a view has gained no

credence among the circuits would be yet another argument in *favor* of review by this Court.

6. In a case decided after the petition was filed, the Fourth Circuit has confirmed the broad holding of the decision below. In *JH v. Henrico County School Board*, No. 04-1454, 2005 U.S. App. LEXIS 1024 (4th Cir. Jan. 20, 2005), the school district unilaterally *changed* an IEP, cutting dramatically the level of therapy provided to a child with autism.[2] Reversing the hearing officer, who had placed the burden on the school district, the Fourth Circuit said the parents must bear the burden. The court explained its decision by invoking the case that is the subject of this petition:

> In *Weast*, we held that, under the IDEA, parents, not the school system, bear the burden of proof in a state administrative proceeding initiated by

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[2] *JH* illustrates the difficulties parents often face in dealing with local school districts. There the school district unilaterally cut the child's speech/language and occupational therapy by 90 percent. *See JH*, Supplemental Joint Appendix at 87 (decision of hearing officer).

While a school district may not change a child's current "educational placement" without an agreement or adjudication, 20 U.S.C. § 1415(j), this term is not defined by statute. Courts have held that an "educational placement" is changed only if there has been "a *fundamental* change in, or *elimination* of, a basic element of the educational program." *E.g., Erickson v. Albuquerque Pub. Sch.*, 199 F.3d 1116, 1122 (10th Cir. 1999); *Sherri A.D. v. Kirby*, 975 F.2d 193, 206 (5th Cir. 1992); *Spilsbury v. District of Columbia*, 307 F. Supp. 2d 22, 27 (D.D.C. 2004) (emphasis added). Thus, the school district may sometimes circumvent the restriction by claiming that a reduction or change in services is not "fundamental," thereby forcing the parents to acquiesce or initiate legal action.

> the parents to challenge the substantive adequacy of an IEP.

Id. at *26, n.7. So important was the burden of proof to the outcome that the court was unable to reach a final judgment and remanded the case all the way back to the hearing officer so that he could review the evidence in light of the new standard.

Thus, as far as the Fourth Circuit is concerned, it does not matter whether the dispute involves an initial IEP or a school district's unilateral change to a previously-agreed IEP. If the parents challenge the school district, they bear the burden of proof. By thus placing the burden on the parents, the rule adopted by the Fourth Circuit conflicts sharply with the rule followed by six other circuits – and by the Supreme Court of New Jersey – where the burden is placed on the school district. *See* Pet. at 17. It is a conflict this Court should resolve.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

BRIAN SCHAFFER, a minor,
by his parents and next friends,
Jocelyn Schaffer and
Martin Schaffer;
JOCELYN SCHAFFER; and
MARTIN SCHAFFER

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